It was next contended on behalf of the appellant that no trust was created by the undertaking given by him to pay the money to the purchasers. We agreed with the submission that there was no express declaration of trust by the appellant to the effect that he will hold the money for the respondents. Counsel for the respondents also agreed that there was no express trust as such, but he submitted that by his conduct the appellant had become a constructive trustee for the respondents. For this he relied on the following passage from the judgment of Kay L.J. in *Soar* v. *Ashwell*[1]: —

"Generally speaking, a person who is not the appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee."

At page 405, the learned judge had this to say about limitation:

"The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence."

In our judgment the learned trial judge was right in holding that the appellant was in fact a constructive trustee of the money which had been paid to him on behalf of the purchasers.

Counsel for the appellant next dealt with the question as to whether the money paid out to the appellant could be recovered from him as money had and received by him to the use of the respondents. In this connection he submitted that the respondents had abandoned their cause of action for money had and received by not making any mention of it in their prayer to the statement of claim. Counsel for the respondents contended that there was no abandonment by the respondents of paragraphs 5, 6, 7 and 8 of their statement of claim which formed the basis of their claim for money had and received. He submitted further that the omission in prayer A(ii) to refer to the sum of $59,040 as money had and received did not alter the basis of the claim. We agreed with that submission. The fact that the respondents did not know until 1970 that the money had been paid out to the appellant was never in question, so that the period of limitation ran from that year, with the result that the action was not statute barred.

The only other ground taken on behalf of the appellant was that if the respondents were entitled to any compensation they could only claim it under paragraph 3(g) of their agreement of sale with the first defendant. In our judgment, that clause in the agreement of sale applied only to compensation in relation to any discrepancy in the area agreed to be sold after resurvey.

For the reasons we have stated we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *V. Veerappan; Yeoh Kian Teck & Co.*

N.T.S. ARUMUGAM PILLAI v. GOVERNMENT OF MALAYSIA

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) April 16, 1976]

[Penang — Federal Court Civil Appeal No. 147 of 1975]

Income Tax — Claim for additional tax — Leave to sign final judgment given — Appeal from decision of Judge — Whether limitation applies to proceedings by Government for recovery of tax — Limitation Ordinance, 1953, s. 33(1) — Income Tax Act, 1967, ss. 91 and 106(3).

This was an appeal from the decision of Arulanandom J. who had given leave to the Government to sign final judgment against the appellant on a claim for additional income tax. The main contention on behalf of the appellant was that the additional assessments for the years of assessment 1953 and 1958 were statute barred because they were not made before the expiration of twelve years from the respective years of assessment.

Held, dismissing the appeal: (1) limitation as such does not apply to any proceedings by the Government for the recovery of any tax;

(2) the words "within twelve years" in section 91(3) of the Income Tax Act, 1967, are irrelevant where there has been any wilful default on the part of the taxpayer in disclosing part of his income for any particular year of assessment;

(3) under section 106(3) of the Income Tax Act, 1967 the court was not able to entertain any plea that the amount of tax sought to be recovered was excessive or incorrectly assessed.

Case referred to:-

(1) *Arumugam Pillai* v. *Government of Malaysia* [1975] 2 M.L.J. 29.

FEDERAL COURT.

K. Chandra for the appellant.

Mokhtar bin Haji Sidin (Sr. Federal Counsel) for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the defendant in the action from a decision of Arulanandom J. granting the application under Order 14 by the respondent as plaintiff for leave to sign final judgment on his claim against the defendant for the sum of $5,262,844.67 with interest and costs.

The plaintiff's claim was in respect of additional income tax due for the years of assessment 1953 and 1958, income tax for the years of assessment 1966, 1967, 1968, 1969, 1970, 1973 and 1974 and the 10% increase levied under section 103(4) of the Income Tax Act, 1967.

The first 4 grounds of appeal against the learned judge's decision, as stated by counsel for the appellant at the very outset, were similar to the grounds of appeal which this court rejected in a similar appeal by the same appellant in *Arumugam Pillai* v. *Government of Malaysia*.[1] He urged nothing new in support of these grounds in this appeal, and we could find no reason to differ from what we said regarding them in the earlier appeal.

The 5th and 6th grounds of appeal respectively were that the learned judge erred in law when he held that he could not consider the defence that the additional assessments for 1953 and 1958 are statute barred because it had not been pleaded in the defence and that he erred in law when he held that there was wilful default on the part of the defendant. In this

connection it was submitted that, although limitation was not pleaded in the statement of defence, the defendant had raised it in paragraph 10 of his affidavit in opposing the plaintiff's application for leave to sign final judgment.

The main contention by counsel for the appellant in support of these two grounds was that the additional assessments of income tax for the years of assessment 1953 and 1958 were statute barred because they were not made before the expiration of 12 years from the respective years of assessment. For this he relied on section 91(1) of the Act which reads as follows:—

"The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year."

Counsel for the respondent on the other hand contended that there was wilful default on the part of the appellant in that he failed to disclose part of his income when he submitted his returns for the years of assessment 1953 and 1958, so that section 91(3) of the Act applied. That section reads as follows: —

"The Director General where it appears to him that —

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question."

The learned counsel further contended that this issue, if there was anything in it, should be raised by the appellant before the Special Commissioners for Income Tax to whom an appeal has in fact been lodged.

The view which we took was that there was no substance in what counsel for the appellant contended and that what counsel for the respondent said in reply had substantial merit in it. In our judgment limitation as such does not apply to any proceedings by the Government for the recovery of any tax. This would seem clear from the proviso to section 33(1) of the Limitation Ordinance 1953. Reading section 91 of the Income Tax Act, 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words "within twelve years after its expiration" are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.

It was contended for the appellant that there was no allegation of wilful default in the affidavit in support of the plaintiff's application under Order 14. But the fact that additional assessments were made for the years of assessment 1953 and 1958 was sufficient to indicate such default. In any event, section 106(3) of the Income Tax, 1967 provides that "in any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5)." In the circumstances the learned judge had no power to entertain any of the pleas raised before him by the appellant in opposing the plaintiff's application for leave to sign final judgment.

For the reasons which we have stated we had no alternative but to dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Dato S.P. Seenivasagam & Co.*

RE CHOONG KHIAW REALTY CO. SDN. BHD.; TAN SWEE LIAN v. CHIA CHUNG MEE & ANOR.

[F.C. (Gill C.J. (Malaya) Ong Hock Sim and Raja Azlan Shah F.JJ.) April 19, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 13 of 1974]

Companies — Voluntary liquidation of company — Whether liquidator has power to split joint shares on application of one of joint holders — Whether liquidator can recall money properly paid out before his appointment as liquidator.

In this case the first and second respondents held in their own rights 4 and 5 shares respectively in a private limited company. The second respondent also held jointly with one of her step-brothers 10 shares, which it was alleged were to be held by them according to the instructions and wishes of their father, the founder of the company, in trust for the family's relatives in China. The second respondent also held 6 shares jointly with another of her stepbrothers. The company made a capital profit on the sale of a rubber estate and it was decided to pay advances from the capital profit to all the shareholders of the company at $6,090.38 per share. In respect of the joint holding of 10 shares, the second respondent and her stepbrother were paid a sum of $60,903.80 by cheques, for which the second respondent signed the receipt vouchers. In respect of the joint holding of the 6 shares, the second respondent and her other stepbrother were paid a sum of $36,542.20 by cheque, for which again the second respondent signed the acknowledgment receipt. Subsequently the company went into voluntary liquidation and the appellant was appointed the liquidator. The second respondent took out a summons in chambers to ask for orders that the shares which she held with her stepbrothers be split by the liquidator and that the liquidator should recover the sums paid on the joint shares and send the money from the 10 shares to relatives in China and pay to the second respondent her share of the advance on the 6 shares jointly held with her stepbrother. She also asked that the winding up should be conducted under the supervision of the court. The learned trial judge stated that he was not in a position to decide on the allegations of misfeasance and misconduct against the liquidator and the directors and therefore declined to make orders on the prayers relating to the splitting of the joint shares but he made orders on the remaining prayers for the liquidation in effect to be under the supervision of the court. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the liquidator had no power to split the joint shares on the application merely of one of the joint holders without any reference to the other joint holders;

(2) the liquidator had no power to recall the moneys which had been properly paid out before she was appointed liquidator;

(3) no orders could therefore be made on the prayers relating to the splitting of the shares and the recovery of the moneys;

(4) in the circumstances the orders made on the other prayers in the summons in chambers would serve no purpose except to hold up indefinitely the winding up of the company, which after the payment of the capital profits to the shareholders, admittedly had very little money left for distribution.